

1 to seeing the results.

2 BOB HERMANSON: Thank you.

3 MR. HARNETT: And Don, if you want to move over or
4 get the card over, that would be useful.

5 Our next speaker is Ann Alexander of the
6 Illinois Attorney General's office.

7 We welcome you. You have 15 minutes for your
8 presentation, and then there will be a period of
9 questioning after.

10 I will warn you at a two-minute mark; so feel
11 free and go right ahead.

12 ANN ALEXANDER: Good morning. I would like to
13 start out by saying that the Attorney General very
14 strongly supports the Title V program in principle. We
15 believe that properly implemented it can bring the
16 compliance status of major facilities into full view
17 and facilitate their achieving compliance; and it also
18 provides an essential tool for public involvement: It
19 takes complex and disparate Clean Air Act requirements
20 and makes them accessible in one document, and requires
21 monitoring to ensure that the public is apprised of
22 compliance on an ongoing basis.

23 We think those are all extremely important
24 principles and worth defending.

1 Our concern is that we do not believe that the
2 program's potential is being met here in Illinois. And
3 there are two reasons for that. The first is that
4 severe delays in issuing the Title V permits to some of
5 the worst polluting facilities have -- I would have to
6 say -- gotten out of hand.

7 These facilities that I'm referring mostly to,
8 the largest coal plants in the state, have been
9 pending -- the permits have been pending for nine
10 years. They're at the proposed permit stage.

11 That's one problem.

12 And I think the other what I would characterize
13 as a more serious problem is that the Illinois
14 Environmental Protection Agency has not fully
15 implemented the compliance assurance aspects of Title V
16 despite a lot of evidence of ongoing noncompliance on
17 the part of the applicant facilities.

18 Touching on the first issue regarding timing,
19 we do recognize that tremendous progress has been made
20 in Illinois; a lot of these permits have been issued.
21 We support that.

22 In fact, I would say the vast bulk have been
23 issued.

24 But the problem is the ones -- the permits that

1 have not been issued are for very heavily polluting
2 facilities: They're the coal plants in Illinois.

3 And during the nine years that these permit
4 applications have been pending, the public has been
5 hampered in its ability to assess the compliance status
6 of these facilities.

7 So we -- we think that in and of itself is a
8 significant problem.

9 But as I said, I think the more significant
10 problem is the compliance assurance issue. Essentially
11 IEPA, as I will explain in more detail, has essentially
12 declined to use the full authority that's vested in it
13 by Title V to assess and assure compliance on the part
14 of the applicant facilities.

15 To begin with, we believe it could really
16 hardly be plainer as a legal matter that IEPA has both
17 the right and the obligation to assess compliance and
18 assure compliance in the context of Title V with
19 respect to all applicable Clean Air Act requirements.
20 That really is all over the statute in regulations.

21 Both the federal and the state regulations
22 state that the permitting authority shall have
23 authority to, quote, assure compliance by all sources
24 required to have a permit under this subchapter with

1 each applicable standard, regulation or requirement of
2 the Clean Air Act.

3 And in order to implement that authority these
4 regulations, both federal and state, say that a permit
5 application is not complete unless it contains
6 information, quote, sufficient to evaluate the subject
7 source and its application to determine all applicable
8 requirements under the Clean Air Act in its
9 regulations.

10 Now, to the extent in this application process,
11 once they receive a complete application as thus
12 defined, there is any ongoing noncompliance with any
13 requirement of the Clean Air Act, the applicant is
14 required to submit, again as part of a complete
15 application, a schedule of compliance for sources that
16 are not in compliance with all applicable requirements
17 at the time of permit issuance.

18 All of this -- the emphasis on the
19 comprehensive nature of Title V, and specifically the
20 comprehensive nature of compliance assurance -- is
21 entirely consistent with the legislative history of
22 Title V, which makes clear that all compliance issues
23 should be addressed in the permit.

24 So as far as we're concerned, there's really no

1 doubt about this. I do have written remarks. So I
2 have provided citations -- not that you all probably
3 don't have them all for this.

4 But we think that's important groundwork for
5 the fact that the -- this comprehensive nature of Title
6 V clearly encompasses, we believe, the NSR and NSPS
7 programs, which of course are applicable requirements
8 under the Clean Air Act, to the extent the facility has
9 performed modifications that trigger those
10 requirements.

11 Notwithstanding that, IEPA has specifically
12 declined to address the NSR and NSPS requirements in
13 the Title V permitting process.

14 Essentially what they have done in these
15 Title V permits for the coal facilities that we've
16 looked at is take at face value these applicants'
17 blanket representation that they were in compliance.
18 The applicants said they were; that was taken,
19 essentially put in the permit with the statement that
20 NSR and NSPS did not comply.

21 We believe that at minimum what the agency
22 should have done in this context rather than just
23 taking the representations at face value should have
24 been to first request a list of capital projects that

1 were performed at the applicant's facilities under --
2 during the relevant time period; and secondly, request
3 information concerning the cost and the purpose and the
4 timing of these projects, whatever is necessary to
5 determine whether the projects constituted major
6 modifications that triggered the NSR and NSPS programs.

7 It has really been very clear since the 7th
8 Circuit decision in WEPCO what type of information is
9 relevant to an NSR applicability determination. We
10 believe there's no reason that that information should
11 not have been requested in the Title V permitting
12 process, and a lot of reasons that it should.

13 Now, to the extent any major modifications were
14 found to have occurred based on such information that
15 IEPA should have requested, the agency should have
16 required a compliance plan for meeting the NSR and NSPS
17 more stringent standards.

18 I would provide an example of, you know, what
19 the practical consequences have been of this failure to
20 essentially look at the -- use or take advantage of the
21 compliance assurance function within the Title V
22 program.

23 U.S. EPA Region 5 here has been actively
24 seeking for quite a long period of time information

1 from Midwest Generation through Section 114 regarding
2 the applicability of NSR and NSPS. Now, what there --
3 what they're seeking has not -- they have not been
4 entirely successful in retrieving it, essentially due
5 to the vagaries of the Section 114 process.

6 They have essentially thus far failed to obtain
7 a complete set of the necessary information to
8 determine whether there have been violations on the
9 part of these midwest generation facilities.

10 This circumstance highlights and really makes
11 it all the more important that IEPA fulfill its
12 obligation under the Title V program to request this
13 information; and it really makes it all the more
14 damaging that it has failed to do so.

15 Simply put, enforcement is not an efficient way
16 to gather data on NSR compliance, and the Title V
17 program is.

18 I would mention also in addition to the NSR,
19 NSPS violations which are obviously -- which are sort
20 of front and center in what we have been looking at,
21 there do appear to be other noncompliance issues that
22 have not been addressed by IEPA in the Title V process.
23 Specifically, we've learned through inspection of
24 documents that there have been years of ongoing opacity

1 violations by some of these coal-fired plant permit
2 applicants, yet none of the proposed permits address
3 those violations either.

4 We are mindful in all of this of the fact that
5 evaluation of NSR and NSPS applicability is resource
6 intensive. We're mindful of the fact that IEPA's
7 resources are limited.

8 However, the agency has specifically taken the
9 position at one time or another that it's not legally
10 required to address the NSR and NSPS requirements in
11 the context of the compliance assurance portions of the
12 Title V program. And we believe that's simply wrong on
13 the law.

14 It really needs to be made clear to permitting
15 agencies that their obligation in the Title V process
16 to address all requirements actually means all
17 requirements.

18 Once that is clear, steps should be taken to
19 ensure that these agencies have the resources that they
20 need to carry out their legal obligation.

21 In particular, we believe it would be helpful
22 if first the regions would collaborate more closely
23 with the state permitting authorities to ensure that
24 their efforts to gather necessary information are

1 working in tandem; and secondly, the state authorities
2 should receive, to the extent possible, whatever
3 technical assistance they may need in addressing the
4 complexities of the NSR and NSPS programs.

5 That concludes my remarks. If you have any
6 questions?

7 MR. HARNETT: Thank you. Don van der Vaart?

8 MR. VAN DER VAART: Thanks a lot.

9 That's -- you all are working hard on
10 utilities.

11 Let me ask you a question about that.

12 First of all, just in -- in -- to set the
13 stage, you believe that the Title V permit should
14 define both compliance and noncompliance.

15 Did I -- did I hear that right?

16 ANN ALEXANDER: Well, essentially -- the Title V
17 program essentially as we read it requires that they
18 collect information on compliance. And to the extent
19 there is noncompliance, that must be addressed in a
20 compliance plan.

21 MR. VAN DER VAART: Or once they get their permit
22 in the certification.

23 ANN ALEXANDER: Yes.

24 MR. VAN DER VAART: Okay. Now, the thing as far as

1 the NSA and NSPS questions, is the agency proposing a
2 permit -- I presume they haven't actually issued the
3 permit yet?

4 ANN ALEXANDER: It's a proposed permit.

5 MR. VAN DER VAART: Are they proposing in the app.
6 Permit an applicable shield, saying they are not
7 subject to NSR and NSPS, or are they not including any
8 permits to show compliance for those?

9 ANN ALEXANDER: What they have is a specific
10 statement saying NSR and NSPS do not apply to these
11 facilities. There's no explanation of what goes behind
12 that. It's essentially based on the company's
13 representation; but it's expressed.

14 MR. VAN DER VAART: That's a shield under the
15 504(f) too.

16 ANN ALEXANDER: Uh-huh.

17 MR. VAN DER VAART: And that hasn't gone through
18 Region 5 yet.

19 ANN ALEXANDER: Well, actually there is -- you
20 might have heard about this yesterday perhaps, but
21 there's a lawsuit pending because Region 5 did not
22 object; they were petitioned to object; they did not.
23 And essentially a 60-day notice was filed, and as of
24 two days ago suit was filed by environmental groups

1 concerning that.

2 MR. VAN DER VAART: Had Section 114 letters gone to
3 these utilities prior to the drafting of these permits?

4 ANN ALEXANDER: I don't know the exact timing on
5 drafting. The per -- as I mentioned, the permit
6 applications were back in 1995. So some stage of the
7 drafting may have happened then.

8 The 114s were all from the last two years.

9 MR. VAN DER VAART: Right. But the 114 letters had
10 gone out to these utilities before the proposed permit
11 went down to Region 5 for approval?

12 ANN ALEXANDER: Yes.

13 MR. VAN DER VAART: Oh.

14 MR. HARNETT: Adan Schwartz?

15 MR. SCHWARTZ: Hi. I'm a lawyer with a Title V
16 permitting agency as a client, and I can relate to not
17 being always happy with the way they're doing things.
18 It seems to be your situation.

19 But -- is this on?

20 THE AUDIO TECHNICIAN: It is.

21 MR. SCHWARTZ: My question goes to one of your
22 statements, the statement that enforcement authorities
23 are not as effective as Title V authorities to gather
24 information about NSR violations. I think I -- if I

1 fairly restated that.

2 I've usually had a different point of view on
3 that. So I'm going to ask you to expand on that
4 statement.

5 But first I want to make the observation
6 that -- and this does tend to be fact-specific, so
7 generalizations are hazardous. But the problem I have
8 seen is that when you -- for instance, when you want to
9 put a compliance schedule in a Title V permit based on
10 a perceived violation, you essentially have to put your
11 case together in the record to support that permit
12 issuance. And -- because you're going to be defending
13 that when they appeal it.

14 And that can take a lot of work as well.

15 And it also tends to hold up issuance of the
16 Title V permit.

17 And so what you're doing is you're holding up
18 the issuance of this permit, which is going to be a
19 useful compliance tool for at least for other reasons,
20 and you're holding it up to try to resolve this
21 violation.

22 And so there's -- you know, there's a cost
23 benefit to be examined there.

24 But anyway, if you could expand on your

1 thoughts about enforcement authorities versus Title V
2 authorities.

3 ANN ALEXANDER: Well, I mean, let me just say that
4 my remarks about the effectiveness are based on
5 observations of what's been happening in Illinois and
6 in Region 5, which is that it just has not been smooth
7 or efficient or effective to gather the necessary
8 information through 114. Whether or not that's
9 universal or whether or not it has to be, I think, you
10 know, is arguable. That would certainly be open for
11 discussion.

12 I think what's important to bring it back to is
13 that this -- this is the law. The law does require
14 that all applicable requirements be incorporated into
15 the permit.

16 And our concern beyond the fact that that's the
17 law and we need it -- believe it needs to be complied
18 with, is there is emerging evidence or statements, I
19 should say, in recent court decisions that it may even
20 be problematic if a compliance schedule has not been
21 imposed in the context of Title V permitting, if then
22 enforcement is prosecuted independently.

23 We believe that -- what really should happen is
24 that these tracks should be going in tandem. I'm not

1 suggesting that, you know, the regions no longer send
2 out 114 requests, I'm suggesting that this is not
3 sufficient and that both things should be happening.

4 And yes, it may create some delays, but we
5 don't think that essentially these important compliance
6 assurance requirements should be sacrificed on the
7 altar of speed.

8 I mean, notwithstanding our frustration with
9 the pace of this permitting, we think that that
10 requirement is central enough that it just has to
11 happen.

12 MR. HARNETT: Bernie Paul?

13 MR. PAUL: Do you know how long the process has
14 been involved with the 114 letters and the gathering
15 the information to establish the enforcement cases?

16 And let me get some context about that.

17 Let's just say that process has taken five
18 years to accomplish and you've gotten so far in the
19 process.

20 Would you expect that that same
21 information-gathering process necessary to create the
22 right conditions in the Title V permit so that, you
23 know, you and the source will ultimately agree what the
24 right act determination is and so forth -- how long do

1 you expect that would take in implementing that Title
2 V, and how would you resolve that with your desire to
3 get the permits out more quickly?

4 ANN ALEXANDER: Well, I think to a large extent
5 that really depends on the aggressiveness with which
6 the agencies, both federal and state, pursue these.

7 In this case the title -- I'm sorry -- the 114
8 information process has been in place -- I'm not
9 positive, I'm estimating about two years.

10 It's nowhere near complete.

11 The agent -- the utility has not been providing
12 the necessary information, so it's hard to estimate how
13 long it's going to go on.

14 That having been said, I -- well, I mean, as I
15 just said, I think that there are ways to make that
16 process move faster.

17 I think that, you know, with these tools in
18 hand, 114 and the NS -- and the Title V process working
19 in tandem, you would hope that these could be resolved
20 not instantaneously but not after nine years of delay
21 either.

22 MR. PAUL: Just to follow up -- and you suggest it
23 could be then perhaps more expeditiously through Title
24 V.

1 Does that process assure the source of the same
2 due process that they would be entitled to in an
3 enforcement action?

4 I'm concerned that when you say that the Title
5 V process could be -- can expedite more quickly, the
6 source may not be entitled to the same senses and
7 opportunities to present their case which they were in
8 enforcement action.

9 And so that's something that I'd like to hear
10 your views on.

11 ANN ALEXANDER: Okay. Well, I think -- I mean, you
12 can also break this down into two parts. The first
13 part is the information gathering. That is an
14 independent requirement within the Title V program.

15 There really is no difference for due process
16 purposes whether the information is gathered in the
17 context of 114 or whether it's gathered in the context
18 of the -- of the compliance assurance process of
19 Title V.

20 Once that happens, I think that the question
21 really is not a lack of due process in either context
22 but what the avenue for challenge would be. An
23 enforcement action it's more direct, but there would
24 still be opportunities if necessary to challenge the

1 permit.

2 Arguably the advantage of the Title V process
3 is that there is more opportunity for dialogue with the
4 permitted agency rather than coming at them after the
5 fact. You know, essentially to present them with
6 what's happened, hold the discussion, work it out in
7 the context of the permit.

8 It's a more naturally cooperative process.

9 MR. HARNETT: Richard Van Frank?

10 MR. VAN FRANK: Bob Palzer's had his card up.

11 MR. HARNETT: I'll get to everybody.

12 MR. VAN FRANK: Okay.

13 You mentioned that there's been a nine-year
14 period and there's still no permit.

15 Do you know whether the permit applications
16 have been updated during that nine-year period?

17 And the reason I ask this question is that the
18 permit is supposed to be based upon the application.
19 And the public cannot go in there and comment on the
20 permit very well if the application does not -- if the
21 permit does not really reflect what is in the
22 application.

23 ANN ALEXANDER: That one I'm -- I can only say I
24 have not seen updates to the application. I do not

1 know that they have not happened.

2 MR. HARNETT: Bob Palzer.

3 MR. PALZER: You mentioned your concern with the
4 long timeline getting some of these major facilities
5 permitted. And that's been a general theme both from
6 some of the sources in the length of time it takes to
7 get the permit as well as with the, you know, members
8 of the public who are concerned that sources aren't
9 regulated.

10 Can you suggest any specific ways that this
11 process could be expedited?

12 ANN ALEXANDER: It's a difficult question to
13 answer, because I recognize that to some degree it is
14 based on resources. And I also have to confess that
15 since I don't work at IEPA, I would almost hesitate to
16 offer too many proposals as to how they should adjust
17 their process.

18 My statement is really kind of more general
19 along the lines of nine years is a very long time. And
20 I have to believe that there are ways that this could
21 be moved along faster, although it may well provide --
22 it may well require that more resources be provided to
23 the agency.

24 I mean, as I mentioned in my remarks, I'm well

1 aware and I hear from them very often that they feel
2 that they lack the staff time to carry out what we're
3 asking them to do.

4 MR. HARNETT: Lauren Freeman?

5 MR. PALZER: Actually, could I do a follow up in.

6 MR. HARNETT: Sure.

7 MR. PALZER: This also seems to be a generic
8 problem, and that is that many of these agencies don't
9 seem to have the funds to be able to carry on the
10 program, yet it is a requirement that the Title V
11 program is supposed to gather enough in fees to be able
12 to support the program.

13 Any suggestions along those lines as to what
14 could be done?

15 ANN ALEXANDER: Well, I -- I mean, I think the
16 question of appropriate funding sources is a difficult
17 one.

18 I mean, you've just mentioned one option, which
19 is fees. And honestly, I hesitate to answer that
20 because I have not studied carefully the fee structure
21 of the Title V program. I think that it's important
22 that all options be considered in terms of how more
23 resources can come to the agency.

24 And it's entirely possible that we're not

1 merely talking about funds. It seems to me that a
2 closer working relationship between the regions and the
3 state permitting authorities could also facilitate the
4 process; perhaps not so much with an injection of funds
5 but simply with the resource expertise that I believe
6 sometimes the regions can offer in these situations.

7 And more specifically, it -- it enables them
8 not to reinvent the wheel in the sense that if the
9 region is in fact putting out a 114 request and they
10 have information and they have already begun to look at
11 this question, then that information should be shared
12 collaboratively with the state agency so that they can
13 perhaps take it from there in their
14 information-gathering rather than having to look at the
15 problem from scratch.

16 MR. HARNETT: Lauren Freeman?

17 MS. FREEMAN: I just wanted to get back for a bit
18 on this due-process question.

19 You cited a number of regulations about
20 compliance assurance. And I'm aware of the regulation
21 that would require a compliance plan if a responsible
22 official certified noncompliance. No question there,
23 no dispute about it.

24 But can you cite specifically a regulation or

1 something in the Clean Air Act that would impose a
2 requirement or even the authority to adjudicate a
3 disputed allegation of noncompliance in a Title V
4 permitting process?

5 Or to issue a permit without an adjudication.

6 ANN ALEXANDER: Well, to some extent I think that
7 putting the question that way would essentially make --
8 I mean, what I understand the -- that you're positing
9 is that if there is a dispute regarding noncompliance,
10 then essentially there is, arguably, no longer
11 authority on the part of the permitting agency to
12 certify that.

13 What I -- I would respond that I think
14 essentially what that creates really is an exception
15 that swallows the rule. Because in that situation the
16 regulated entity is pretty much always going to argue
17 that there's controversy over compliance.

18 It's not difficult to find a hook to argue:
19 Yes, we really are in compliance. That would then put
20 these in dispute and essentially leave the agency
21 without authority to determine -- you know, to
22 essentially put noncompliance in the compliance plan or
23 to address it in that way.

24 Essentially we believe it's clear that just

1 given the nature -- well, for example, of the NSR
2 program, but I also mentioned opacity as well -- there
3 are certain requirements that the regulated entities
4 must adhere to. If those requirements have not been
5 met, if there is evidence of noncompliance, the agency
6 is allowed to judge that. They do that all the time in
7 the enforcement context.

8 And yes, there are avenues by which that can be
9 challenged in the enforcement context, and there are
10 avenues that can be appealed in the appeal process; but
11 we don't believe the agency's hands are tied merely by
12 the fact that a controversy has been raised regarding
13 compliance.

14 MS. FREEMAN: Just follow up. I hear you making
15 some policy arguments about what you believe Title V
16 ought to do, but can you cite something that actually
17 suggests that Title V was meant to trump 113 and the
18 procedures that are there to establish violations?

19 ANN ALEXANDER: Well, I believe that what I have
20 cited -- and I -- the citations, as I mentioned, are in
21 my written remarks -- is really very clear. It says
22 that any time there is noncompliance, that
23 noncompliance shall be addressed in a compliance plan.

24 Now, I think what you're arguing is that

1 essentially it's not noncompliance in the sense that
2 you can deal with it in the compliance plan to the
3 extent that there is a controversy. What I'm saying is
4 that's an exception that I don't believe that there is
5 any evidence for anywhere.

6 I think that it's very clear on the face of it
7 that if there's noncompliance, if the agency determines
8 that there is, that that goes into the compliance plan.

9 And I guess I would turn the question around to
10 you and ask for any evidence to the effect that -- that
11 simply raising a controversy, a permitting authority
12 challenging the compliance status essentially wipes out
13 that authority.

14 MS. FREEMAN: Well, I mean, there are procedures.
15 You issue an NOV, you file a District Court complaint.

16 I mean, there are procedures that you use to pursue
17 alleged violations and to adjudicate it.

18 ANN ALEXANDER: And this is a different set of
19 authority. That's one set, and this is a different
20 set.

21 That is really very clear in the regulations.
22 It says to the extent that there are violations that
23 are determined through the permit application process,
24 then those violations need to be addressed in Title V.

1 It's there in the regs, it's there in the
2 statute, it's there in the legislative history.

3 MS. FREEMAN: So you would have all appeals of the
4 agency's determinations of violations through Title V
5 go through the state court permit appeal process?

6 That's what you think the Clean Air Act
7 contemplates?

8 ANN ALEXANDER: Yeah; I mean, there -- there are
9 ways in which these could ultimately -- yeah; I mean,
10 whatever the permit appeal process is in the state
11 court, that's where they should go.

12 MR. HARNETT: We're going to probably run a little
13 long with this questioner, but we're ahead of schedule.
14 So that's why I allowed the exchange to continue there.

15 Shannon Broome?

16 MS. BROOME: So I -- I just want to understand:
17 Has there been a determination of noncompliance?

18 ANN ALEXANDER: No; because they don't have the
19 information sufficient.

20 MS. BROOME: So there's been no determination of
21 noncompliance. And that's part of your concern
22 with -- Illinois EPA has not made one.

23 ANN ALEXANDER: Well, no, it's beyond that. What
24 they've done is they've made a determination of

1 compliance without any information.

2 MS. BROOME: Okay. So let's -- okay. So there's
3 been no determination of noncompliance.

4 And without any formal determination of
5 noncompliance, you would agree that there's no basis
6 for a compliance schedule; right?

7 ANN ALEXANDER: Well --

8 MS. BROOME: Without a determination.

9 ANN ALEXANDER: There's no basis because they
10 haven't looked for a basis. The company said we're in
11 compliance, and they said we believe you.

12 MS. BROOME: Let's take your premise and assume
13 that they were to put a compliance schedule in the
14 permit.

15 Are you aware that permit terms are not stayed
16 and so that they might put in that you have to install
17 the BACT or LAER or whatever, and a company could be
18 forced to be installing these controls while it was in
19 the appeal process on the permit, and that that would
20 be a different approach than has typically been taken
21 under any kind of enforcement regime?

22 ANN ALEXANDER: Well, I think it's an argument for
23 expediting the permit -- the appeal process. But
24 again, I come back to the fact that the

1 requirements -- that it really is required to be
2 encompassed in Title V. And our concern is that
3 enforcement might even be jeopardized if it's not put
4 in there.

5 MS. BROOME: How so?

6 ANN ALEXANDER: Well, what I'm saying is there have
7 been suggestions in Court decisions that it could be
8 problematic if a requirement is not put in the Title V
9 permit.

10 MS. BROOME: Okay. I would just submit to you that
11 the regulations are absolutely clear that there is no
12 permit shield for things that occurred prior to the
13 issuance of the Title V permit. So there would be no
14 shield. There just wouldn't be.

15 And --

16 ANN ALEXANDER: I hope the Courts are wrong.

17 MS. BROOME: I would be interested to understand
18 how the Title V permit process could be read to
19 supplant the enforcement system that's been in place
20 for 20 years.

21 ANN ALEXANDER: And I don't think it's a question
22 of supplanting the enforcement system. It is really --
23 the law is clear that they can work in tandem and that
24 this is one way in which information is supposed to be

1 gathered.

2 It's -- that the language really is very clear
3 that they're supposed to gather information on
4 compliance with all applicable requirements. And to
5 the extent noncompliance turns up, it's got to go in
6 the permit.

7 Now, I think we can argue about the
8 policy/procedural complications of that requirement,
9 but it just doesn't change the fact that it's a
10 requirement.

11 MR. HARNETT: John Higgins?

12 MR. HIGGINS: Thanks.

13 I'd like to offer a couple observations and ask
14 a question.

15 New York we're quite fortunate that the DEC and
16 the attorney general's office kind of are on the same
17 page. Because we sue all you guys all the time.

18 But anyway, when we were starting to do our
19 Title V program, we had what we perceive as NSR issues
20 with several of the utilities. And we had to ask
21 ourselves the question what's the best way to proceed.

22 And in New York we -- the accused has
23 significant rights in negotiating the settlement to an
24 NOV.

1 And I originally thought it would be a really
2 cool idea to put a compliance plan in their Title V
3 permit and say have a nice day.

4 Well, both our lawyers and the attorney
5 general's lawyers said nice try, but that's not going
6 to work. And what we chose to do is in the body of the
7 permit language reserve our rights to carry out
8 enforcement for past violations. And we have been in
9 negotiation with several utilities for years now on
10 opacity violations and PSD violations; and we're almost
11 at the end of the road.

12 But we preserved our rights to prosecute, for
13 lack of a better word, and issue the Title V permit
14 kind of concurrently. So the utilities were the guys
15 we did first because we thought they were -- you know,
16 they have the biggest tonnage coming out. And that was
17 our choice.

18 I'm not sure why Illinois EPA's decided
19 otherwise. And I had a question if only I could
20 remember -- Oh. Now I remember.

21 Do you have any authority under Illinois state
22 law to either sue your sister agency or in some other
23 way force them to proceed along the lines that you
24 would prefer they proceed?

1 ANN ALEXANDER: We would ultimately have that
2 authority. We hope it does not come to that. But that
3 would be a possibility.

4 You know, I would also remark that while I
5 think -- you know, we -- we could perhaps differ
6 regarding the approach I'm proposing and what you've
7 done, I think what you're describing that the New York
8 DEC has done is a far cry from what Illinois IEPA did.
9 Because essentially EPA just made the blanket statement
10 they're in compliance. And that's what we really have
11 the most significant problem with.

12 Had they reserved right, I don't think that we
13 would like it as well as what we're proposing, but at
14 least there would have been some recognition that the
15 appropriate investigation has not been done.

16 MR. HARNETT: Kelly Haragan?

17 MS. HARAGAN: I just wanted to ask another question
18 to kind of clarify on this due-process issue and see if
19 you agree that there's -- there's kind of two separate
20 issues here.

21 One is the agency's obligation to issue a
22 permit that assures compliance with all of the core
23 requirements, and that that's why they need to have
24 provisions in that permit to assure that going forward

1 the source is in compliance with all requirements
2 including new source review and NSPS; and that agencies
3 do that all the time, they make decisions what to put
4 in a permit, and all the time industry disagrees with
5 it, and that's resolved through the permit process.

6 But that's a separate issue from determining
7 liability for past violations; which if that's going to
8 happen, that still goes forward through a separate
9 track which has the due process rights it always has.

10 I just don't see this as being very different
11 from -- there are bigger issues and bigger expenses
12 with companies; but the agency issues permits all the
13 time that industry disputes what's in it, and that's a
14 part of the appeal process.

15 ANN ALEXANDER: I think what you're saying is
16 basically true. The complication of course when you're
17 dealing with the NSR program is you just want to get
18 your terms straight: What's a past violation, what's an
19 ongoing violation. In the NSR context, the failure of
20 a permitted entity to do something in, you know, 1980
21 is an ongoing violation.

22 So I would not call that a past violation.

23 But, yeah, to some extent if you're dealing
24 with -- you know, if they had an opacity violation in

1 1980 and it ended, that's -- you know, that's a
2 slightly different procedural situation.

3 MR. HARNETT: Bernie Paul.

4 MR. PAUL: I'm thinking about what is the most
5 effective and efficient way to handle this issue. And
6 if I understand what you've posited, or your -- the
7 approach that's got to be taken, I'd like to hear your
8 views on whether or not you think this scenario would
9 actually play out.

10 The state determines that the source is not in
11 compliance with NSR and puts a compliance plan in the
12 Title V permit. And the source doesn't agree that they
13 were not in compliance, and so they appeal the process.
14 And that takes a couple of years to resolve, if that
15 long.

16 And ultimately the Court says, we agree there's
17 a controversy over whether or not this was an actual
18 noncompliance situation, so this should be handled
19 through enforcement action first.

20 How does that -- do you think that that
21 scenario is likely?

22 And do you think that that adds to the
23 efficiency of the program giving Title V permits out?

24 ANN ALEXANDER: I think the scenario is likely only

1 to the extent I -- you know, I think the courts are
2 sometimes wrong. I'm not saying a court wouldn't do
3 that, but what I think is the more appropriate
4 scenario, and what genuinely is the more likely
5 scenario is that a court would evaluate what the agency
6 has done, and as courts always do in these situations
7 where they're evaluating an administrative decision,
8 they would determine based on whatever standard of
9 review was in place whether the agency's decision was
10 appropriate.

11 And if they looked at it and said the agency's
12 decision was an abuse of discretion or arbitrary and
13 capricious, or whatever it is that applies, then they
14 would send it back to the agency. Otherwise they would
15 affirm the decision.

16 I -- I don't think it's likely that they would
17 turn it over to a completely different division of the
18 agency and say you have to divide it -- decide it this
19 way. I don't think the courts generally interfere in
20 agencies' processes to that degree.

21 MR. PAUL: And so do you think that that permit
22 appeal process provides the source with the same
23 opportunities to contest the -- the noncompliance claim
24 of the state?

1 ANN ALEXANDER: Essentially. I mean, it's a
2 different path to take it up. And they -- you know, I
3 can't argue that the permitting -- the permitted
4 authority might not have preferences as to which avenue
5 of challenge they take; either more direct route from
6 enforcement, or a more -- or the permit appeal route.

7 But sure, it's simply a different way to take
8 it up.

9 MR. PAUL: My -- and here's my due-process concern.
10 And that is that the appeal of the Title V permit in
11 reviewing the body, whether it's an administrative law
12 judge or court, is basically going to look at whether
13 or not the state abused its discretion or was arbitrary
14 or capricious, those types of standards which are
15 highly deferential to the agency's opinion.

16 The determination of compliance or
17 noncompliance is really -- I think in a civil action
18 it's the more likely than not standard that that
19 actually occurred.

20 So to me -- I'm not a lawyer, I'm I just play
21 one on TV -- I see this approach as reducing the
22 sources's due-process rights.

23 ANN ALEXANDER: First of all, the standards I do
24 not believe are different. Essentially courts do defer

1 to agency determinations; and we believe that's as it
2 should be in the sense that agencies tend to know more
3 about matters of, say, new source review than a court
4 does.

5 That having been said, the -- assuming
6 hypothetically that in one forum there would be a
7 slightly different standard of review that applies,
8 that is not a due-process issue. One does not look at
9 a standard of review and say, well, the Court is
10 scrutinizing this less closely, therefore 14th
11 Amendment due process has been violated.

12 The 14th amendment just doesn't go to issues
13 like that.

14 MR. HARNETT: I'm going to freeze it at the current
15 card setup. And I have one question before I go to
16 Adan.

17 I'm -- hypothetically, I'm assuming Illinois
18 EPA did not send letters on capital projects to any of
19 its other Title V sources and yet has issued final
20 permits.

21 Is it your interpretation that those sources,
22 now that they've been given a Title V permit that says
23 they were in compliance with all provisions, that they
24 are now absolved of any previous actions by the

1 Illinois EPA?

2 ANN ALEXANDER: I -- I think, unfortunately, that
3 would be a fair reading of it. I don't know that
4 that's actually the approach that IEPA is going to
5 take. That has not been made clear in our discussions
6 with them.

7 I don't think -- I mean, I think it's a legal
8 matter. One would hope, again, with the caveat that
9 you don't know exactly what courts are going to do, I
10 think that the correct approach would be, yes, you
11 could continue enforcement against these entities.

12 However, I think that this creates a danger
13 that there are going to be hurdles to that.

14 I would also mention that the permits are
15 proposed, they're not actually final, the ones where
16 this finding has been made of compliance.

17 MR. HARNETT: Adan?

18 ADAN SCHWARTZ: This is going to be more of a
19 comment than a question, although feel free to respond.

20 First of all, I agree with you on two things;
21 one is that I think Title V authorities who deal with
22 noncompliance and enforcement authorities who deal with
23 noncompliance are intended to exist in tandem, and
24 neither displaces the other.

1 The second thing I agree with you on is I agree
2 it's problematic if Illinois is making findings of
3 compliance and issuing these permits if there's any
4 question about that.

5 At my agency we routinely get comments directly
6 to us from the public -- Marcie Kever knows this very
7 well, because she's written some of them -- making
8 allegations of noncompliance with NSR; and we
9 usually -- whether we agree -- putting aside whether we
10 agree with any specific allegations, we usually take
11 two positions. One is that we're not obliged to go out
12 and find facts and resolve those before we issue a
13 Title V permit. The law aside, from a policy
14 standpoint that would tie us up horrendously.

15 And the other is we're very careful to preserve
16 our enforcement rights so that -- so that hopefully the
17 Title V permit isn't going to hamper us later.

18 And the last thing I want to say is I think
19 there are important generic issues raised by what
20 you've brought to us today, and so I wanted to thank
21 you for -- for coming here and heightening our
22 sensitivity to these issues.

23 ANN ALEXANDER: Thank you. And I guess my response
24 would be similar to - it was to the gentleman from

1 New York, DEC, which is, while I think we might
2 disagree on exactly what the appropriate execution is,
3 I think what you're doing is a significant step beyond
4 what Illinois EPA is doing.

5 MR. HARNETT: Thank you very much for both coming
6 in and putting up for -- with some extended
7 questioning.

8 It's been very helpful to us.

9 ANN ALEXANDER: Would you like a written copy of
10 this?

11 MR. HARNETT: If you could leave it with Graham
12 right at the corner, that would be good.

13 Our next speaker is Susan Zingle of the Lake
14 County Conservation Alliance.

15 SUSAN ZINGLE: Good morning.

16 MR. HARNETT: Good morning. You will have 15
17 minutes for your presentation or talk part of it, and
18 as you get 2 minutes left, I will give you a warning.

19 SUSAN ZINGLE: Okay. Thank you so much. I will
20 caution you, I have nowhere near as technical as the
21 prior witness; but I bring a very interesting
22 perspective, and that is one of the public who's been
23 dealing with this for about the last four years.

24 Lake County Conservation Alliance is a